KARPAL SINGH

v.

SULTAN OF SELANGOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL HAMID OMAR CJ (MALAYA)
[ORIGINATING SUMMONS NO. R 8-31-86 OF 1987]
16 SEPTEMBER 1987

CONSTITUTIONAL LAW: *Pardon by Ruler - Drug traffickers convicted and sentenced to mandatory death sentence - Petition for clemency - Whether mercy is subject of legal right - Sultan of Selangor - Alleged statement he would not pardon drug traffickers sentenced to mandatory death sentence - Whether in violation of Article 42 of Federal Constitution - Proceedings against Sultan - Whether alleged statement made in official capacity or personal capacity - Article 181(2) of Federal Constitution - Whether bar to proceedings against Ruler.*

EVIDENCE: *Hearsay - Press reports - Whether hearsay inadmissible - Failure to contradict press reports - Whether would make it admissible.*

CONSTITUTIONAL LAW: *Pardons Board - Advice by members of Board - Whether mandatory on Ruler to act on advice - Article 42(5) Federal Constitution.*

CIVIL PROCEDURE: *Locus Standi - Plaintiff is a Member of Parliament - Whether has necessary locus standi to bring proceedings.*

CIVIL PROCEDURE: *Striking out action - Is issue justiciable - Whether discloses reasonable cause of action - Principles applicable in governing summary procedure to strike out Originating Summons.*

By an originating summons Mr. Karpal Singh, the plaintiff sought the determination of the High Court, Kuala Lumpur and a declaration to the effect that the public statement allegedly made by the Sultan of Selangor, the defendants, on 26 July 1987 and reported in the New Straits Times, and The Star newspapers of the next day (27 July 87), that His Highness would not pardon anyone who had been sentenced to the mandatory death sentence for drug trafficking in the State of Selangor, was in violation of Article 42 of the Federal Constitution. He contended that the Sultan can only reject a petition for clemency after considering the advice of the Selangor pardons board and then applying his mind to the petition before him.

His Highness, the defendant, applied to strike out the originating summons under O. 18 r. 19 of the RHC 1980 and/or the inherent jurisdiction of the Court on the grounds that:

(1) the originating summons discloses no reasonable cause of action in that the issue raised therein is not justiciable;

(2) the originating summons is barred by reason of the provision of Article 181(2) of the Constitution;

(3) Mr. Karpal Singh the plaintiff, has no *locus standi* to maintain the proceedings he has brought; and

(4) the originating summons is scandalous, frivolous and/or an abuse of the process of the Court.

Held:

[1] The principle governing and the application made under O. 18 r. 19 RHC 1980 is well established and the Court has stated in *Sim Kie Chon v. Superintendent of Pudu Prison & Ors.* that the principle is clear in that "it is only in plain and obvious cases that recourse should be had to the summary process under O. 18 r. 19 RHC 1980: "The summary procedure under this rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'."

[2] The press reports of what the Sultan of Selangor was reported to have said would appear to be inadmissible as hearsay. The fact that the Sultan has not contradicted the press reports did not make the slightest difference for it is well-established that inadmissible evidence does not become admissible by reason of a failure to object. Therefore the originating summons founded upon the press reports may be held to be groundless albeit the judgment this Court was about to pronounce, however, was not founded upon such premises.

[3] Basically, the originating summons relates, at least indirectly, if not directly, to an issue concerning the process of clemency which is clearly non-justiciable. Clause (9) of Article 42 of the Federal Constitution does not make it mandatory on the ruler to act on the advice of the Pardons board. It only makes obligatory on the part of the Pardons board as constituted under Clause (5) of Article 42 consisting of specified persons to consider a written opinion which the Attorney-General may have delivered thereon before tendering advice. In consideration, the Court was of the view that the originating summons disclosed no reasonable cause of action and that the issue raised therein was not justiciable.

[4] The Court is firmly of the view that in the light of Article 181(2) of the Federal Constitution, the plaintiff's claim is plainly barred as the present proceedings is in fact and substance brought against the Sultan of Selangor in his personal capacity. It is fundamental that a proceedings brought against a ruler purportedly in his official capacity is in effect and substantially an action against the ruler personally where such proceedings cannot otherwise be brought without proceedings against the ruler personally. In such a case Article 181(2) of the Federal Constitution may clearly be invoked to bar such proceedings. Article 181(2) of the Federal Constitution should be construed not only in the light of the clear prohibitions enshrined in the Federal Constitution but in line with the spirit and intention of the Federal Constitution.

[5] As to the plaintiff's *locus standi* to maintain this proceedings the Court would firmly say that an action may not be brought by a stranger to it. Indeed, generally, a person may not even institute declaratory proceedings in respect of an act which although prejudicial to his interest, may not affect him in his private rights.

[6] There are various approaches which a Court may adopt in deciding the question of *locus standi.* One approach is to ask whether the plaintiff has "a cause of action. Another approach is to determine whether the plaintiff can establish a "right" which the Court may declare. Yet another approach is to require the plaintiff to demonstrate "a special injury", resulting from the subject matter of the declaration. A fourth approach requires the plaintiff to have an "interest" in the subject matter of the declaration to be litigated. A final approach leaves the question of standing to be determined by the Court in the exercise of its discretion. In the Court's opinion, having regard to the facts and circumstances of this case, whichever of these approaches is adopted, the plaintiff in the present case has no *locus standi* to maintain the proceedings herein.

[7] In consideration, this Court would hold that it has no jurisdiction to entertain the originating summons for reasons firstly, that it raises an issue which is not justiciable; secondly, that it does not relate to specific facts or events or if it does these facts or events are hypothetical; thirdly, that Article 181(2) of the Federal Constitution operates to bar the plaintiff's claim; fourthly, that the plaintiff lacks necessary *locus standi* to maintain these proceedings.

[8] It is in the Court's view a plain and obvious case where this Court in the exercise of its discretion, should strike out the originating summons as being one which this Court considers to be frivolous and vexatious and an abuse of the process of the Court.

[Originating summons struck out with costs.]

Cases referred to:
Sim Kie Chon v. Superintendent of Pudu Prison & Ors. [1985] CLJ (Rep) 293
Attorney-General of Duchy of Lancaster v. L. & N.W. Railway Co. [1892] 3 Ch 274
Mellstrom v. Garner & Ors. [1970] 2 All ER 9
The Russian Commercial & Industrial Bank v. British Bank for Foreign Trade [1921] 2 AC 438
Cox v. Green [1966] 1 Ch 216
Lim Cho Hock v. Government of the State of Perak & Ors. [1980] 2 MLJ 149
Council of Civil Service Unions & Ors. v. Minister of the Civil Service [1984] 3 All ER 935
Michael De Freitas v. George Ramoutar & Ors. [1976] AC 230
Superintendent of Pudu Prison & Ors. v. Sim Kie Chon [1986] CLJ (Rep) 256
Guaranty Trust Co. of New York v. Hannay & Co. [1915] 2 KB 536

Legislation referred to:
Federal Constitution, arts. 42, (1), (5), (8), 181(2)
Rules of the High Court 1980, O. 18 r. 19, O. 15 r. 16
Rules of the Supreme Court [UK], O. 15 r. 17
Specific Relief Act 1950, s. 41

For the plaintiff - In Person
For the applicant/defendant - Tan Sri Abu Talib Othman, Attorney General (Mohtar Abdullah S.L.A., with him)

JUDGMENT

Abdul Hamid Omar CJ:

His Royal Highness the Sultan of Selangor has sought to strike out the originating summons issued at the instance of Mr. Karpal Singh, the plaintiff, under O. 18 r. 19 of the Rules of the High Court 1980, and/or the inherent jurisdiction of the Court.

By his originating summons Mr. Karpal Singh seeks determination of this Court and a declaration to the effect that the public statement allegedly made by the Sultan on 26 July 1987 and reported in the New Straits Times and The star newspapers of the next day, that he would not pardon anyone who has been sentenced to the mandatory death sentence for drug trafficking in the State of Selangor, is in violation of Article 42 of the Federal Constitution (hereafter called 'the Constitution') in that the Sultan can only reject a petition for clemency after considering the advice of the Selangor pardons board and then applying his mind to the petition before him.

In support, Mr. Karpal Singh relies entirely on the press reports as regards the statements attributed to the Sultan allegedly made at the opening of the general meeting of the ex-servicemen's association, Selangor branch. Photostatic copies of the press reports are exhibited.

Mr. Karpal Singh affirms that by publicly stating that he would not pardon anyone who has been sentenced to death for drug trafficking in the state of Selangor, the Sultan was effectively preempting any appeal to him for clemency thereby resulting in the negation of a constitutional right.

Mr.Karpal Singh also affirms that he has the necessary *locus standi* to bring these proceedings by virtue of his oath of office as a member of Parliament which enjoins him to preserve, protect and defend the constitution.

It is Mr. Karpal Singh's contention that Article 181(2) of the Constitution which states that no proceedings whatsoever shall be brought in any Court against the ruler of a state in his personal capacity will not apply to the present case because the statement attributed to the Sultan was made in his official capacity.

The application to strike out is founded on grounds that (1) the originating summons discloses no reasonable cause of action in that the issue raised therein is not justiciable; (2) the originating summons is barred by reason of the provisions of Article 181(2) of the Constitution; (3) Mr. Karpal Singh has no *locus standi* to maintain the proceedings he has brought; and (4) the originating summons is scandalous, frivolous and/or an abuse of the process of the Court.

Principles Governing and Application Made Under O. 18 r. 19 of the Rules of the High Court 1980

The principle is well-established. The Court has stated in *Sim Kie Chon v. Superintendent of Pudu Prison & Ors.* [1985] CLJ (Rep) 293 that the principle is clear in that "it is only in plain and obvious cases that recourse should be had to the summary process under O. 18 r. 19 of the Rules of the High Court 1980: `The summary procedure under this Rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it `obviously unsustainable'.'
(Attorney-General of Duchy of Lancaster v. L. & N.W. Railway Co. [1892] 3 Ch 274 (Supreme Court Practice 1985))."

Court's Observation

Before I consider the grounds, I would, in passing, observe that the sole foundation of the originating summons is the statement allegedly made by the Sultan as reported in the New Straits Times and The Star newspapers on 27 July 1987. There is no affidavit before the Court affirmed to by the reporter concerned stating that he heard the Sultan made such statement. The press reports of what the Sultan is reported to have said would appear to be inadmissible as hearsay. The fact that the Sultan has not contradicted the press reports does not, in my view, make the slightest difference for it is well-established that inadmissible evidence does not become admissibly by reason of a failure to object.

I would also observe that there seems to be a flaw in the plaintiff's case in that, it is common knowledge, the Sultan invariably speaks in Bahasa Malaysia and in that event the press reports of what the Sultan is alleged to have said would therefore have been a translation thereto. If so, who did the translation and was it accurate? Where is the translator's affidavit affirming the accuracy of the contents of the translation? In the absence of such an affidavit the press reports would clearly be inadmissible.

Without the press reports, what other evidence is there to show the Sultan said on the occasion concerned. In my view, therefore, the originating summons founded upon such premises may be held to be groundless. The judgment I am about to pronounce, however, is not founded upon such premises.

Plaintiff's Case is Hypothetical

What seems obvious from the originating summons is that the declaration sought does not relate to specific facts or events, and if it does, these facts or events are hypothetical, that is to say, they have not yet occurred and may never occur. It is nothing but a mere conjecture or speculation on the part of the plaintiff when he implies that the events about which he is apprehensive, namely, the decision to dismiss the petition for clemency by convicted drug traffickers would be made arbitrarily without regard to the recommendation of the pardons board of the state of Selangor, is in breach of Article 42(8) of the Constitution and that a dispute as to breach of a right would arise. The pertinent question is whose right is it? Is it the right of the plaintiff? I hardly think so. It may well be the plaintiff is a member of Parliament and his oath of office demands that he preserves, protects and defends the constitution, but such oath is clearly spelt out in general terms and my view is that it can have no relevance to the particular circumstances of this case. If it is not the right of the plaintiff, whose right is it? It certainly is not the right of a convicted trafficker, for mercy is not the subject of legal rights.

Whether Declaration Should Issue

The plaintiff has by his originating summons sought a declaration. It is fundamental principle that declaration will not be made if the application for it is embarrassing or the declarations can serve no useful purpose: (See *Mellstrom v. Garner & Ors.* [1970] 2 All ER 9)

The learned Attorney-General has referred to a textbook on *Declaratory Orders*, 2nd Edn., by P.W. Young, on the conditions for declaratory orders and has submitted that one of the conditions to be satisfied is that (a) there must exist a controversy between the parties; (b) the proceedings must involve a 'right'; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining the order; (d) the controversy must be subject to the Court's jurisdiction; and (e) it must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility.

"The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought." (*The Russian Commercial & Industrial Bank v. British Bank for Foreign Trade* [1921] 2 AC 438 at 448 per Lord Dunedin).

At this juncture, I would refer to *Cox v. Green* [1966] 1 Ch 216 where it was held "that on its true construction, RSC, O. 15 r. 17 (O. 15 r. 16 of our RHC) was limited to an action or proceeding in which the grant of the declaration sought would not be contrary to the accepted principles on which the Court exercised its jurisdiction, one of those principles being that the Court would not make a declaration in a dispute which was not a justiciable dispute."

I would also refer to the case of *Lim Cho Hock v. Government of the State of Perak & Ors.* [1980] 2 MLJ 149 where the Court held that the Court's power to make declaratory judgments is confined to matters justiciable in the Courts, and the binding declarations which it could make under O. 15 r. 16 of the Rules of the High Court 1980 are limited to legal or equitable rights and do not extend to moral, social or political matters.' (see also s. 41 Specific Relief Act 1950.)

Strictly it is a discretionary relief and the discretion is to be exercised judicially consistent with accepted principles. In the exercise of its discretion the Court shall have regard to the facts and circumstances of each particular case before it decides to grant a declaration.

The Originating Summons, on the face of it, is, in my view, obviously unsustainable and, on this ground alone, the Court in exercise of its powers under O. 18 r. 19 could strike it out.

I now proceed to consider the grounds.

Is the Issue Justiciable?

On ground (1), I recall *Sim Kie Chon's case* where at p. 386, the Court considered the nature of a power of clemency conferred upon the Yang di-Pertuan Agong and the ruler of a state and then stated that "such power is a power of high prerogative of mercy which is an executive act but by its very nature is not an act susceptible or amenable to judicial review. (see *Council of Civil Service Unions & Ors. v. Minister of the Civil Service* [1984] 3 All ER 935)." The Court then went on to refer to the dictum of Lord Diplock in *Michael De Freitas v. George Ramoutar & Ors.* [1976] AC 230, 247 to the effect that "mercy is not the subject of legal rights. It begins where legal rights end." To the same effect was the decision of the Supreme Court in the sequel to that case in *Superintendent of Pudu Prison & Ors. v. Sim Kie Chon* [1986] CLJ (Rep) 256.

Basically the originating summons relates, at least indirectly, if not directly, to an issue concerning the process of clemency which is clear non-justiciable. The Court had again occasion to say in *Sim Kie Chon's* case at p. 386 that "though the Pardons Board tendered advice to the Yang di-Pertuan Agong but clearly the Yang di-Pertuan Agong himself exercised the power in accordance with Article 42(1)." Likewise the power is that of a Sultan in a state. Clause (9) of Article 42 cited by Mr. Karpal Singh does not make it mandatory on the ruler to act on the advice. It only makes it obligatory on the part of the pardons board as constituted under Clause (5) of Article 42 consisting of specified persons to consider a written opinion which the Attorney-General may have delivered thereon before tendering advice.

In consideration, I form the view that the Originating Summons disclosed no reasonable cause of action and that the issue raised therein is not justiciable.

Originating Summons is Barred by Article 181(2) of the Constitution

As for ground (2), I am firmly of the view that, in the light of Article 181(2) of the Constitution, the plaintiff's claim herein in plainly barred. The contention that the statement attributed to the Sultan was made by him in his official capacity is completely unacceptable. It is obvious that the statement was not made in the course or during the progress of a pardons board meeting. On the contrary it was done in his personal capacity. Assuming I was wrong, Article 181(2) would, in my view, still apply to bar the present proceedings as it is in fact and substance brought against the Sultan in his personal capacity. It is fundamental that a proceeding brought against a ruler purportedly in his official capacity is in effect and substantially an action against the ruler personally where such proceedings cannot otherwise be brought without proceeding against the ruler personally. In such a case Article 181(2) may clearly be invoked to bar such proceeding. Article 181(2) should, in my view, be construed not only in the light of the clear prohibitions enshrined in the constitution but in line with the spirit and intention of the constitution.

Locus standi

As regards ground (3), I would firmly say that an action may not be brought to Court by a stranger to it. Indeed, generally, a person may not even institute declaratory proceedings in respect of an act which, although prejudicial to his interest, may not affect him in his private

rights. (see *Guaranty Trust Co. of New York v. Hannay & Co.* [1915] 2 KB 536, 562 per Pickford LJ that "It does not extend to enable any stranger to the transaction to go and ask the Court to express its opinion in order to help him on other transactions.")

There are various approaches which a Court may adopt in deciding the question of *locus standi*. One approach is to ask whether the plaintiff has "a cause of action". Another approach is to determine whether the plaintiff can establish a "right" which the Court may declare. Yet another approach is to require the plaintiff to demonstrate "a special injury" resulting from the subject matter of the declaration. A fourth approach requires the plaintiff to have an "interest" in the subject matter of the declaration to be litigated. A final approach leaves the question of standing to be determined by the Court in the exercise of its discretion.

In my opinion, having regard to the facts and circumstances of this case, whichever of these approaches is adopted, the plaintiff in the present case has no *locus standi* to maintain the proceedings herein.

Court's Finding

In consideration, I would hold that this Court has no jurisdiction to entertain the originating summons for reasons, firstly, that it raises an issue which is not justiciable; secondly, that it does not relate to specific facts or events or if it does, these facts or events are hypothetical; thirdly, that Article 181(2) of the Constitution operates to bar the plaintiff's claim; fourthly; that the plaintiff lacks necessary *locus standi* to maintain these proceedings. I would also add that since the declaration sought is as to the future and it relates to theoretical issues, it is embarrasing and can serve no good purpose. It is, in my view, a plain and obvious case where this Court in the exercise of my discretion, should strike out the originating summons as being one which I consider to be frivolous and vexatious and an abuse of the process of the Court.

I hasten to add that in the light of the Court's finding I see no valid reason to accede to the plaintiff's application to amend the originating summons for the plaintiff to proceed against the state government.

Accordingly, I make an order in terms of the application.

The originating summons is struck out with costs.

Also found at [1987] 2 CLJ 342